PROGRESS OF THE LAW.

As Marked by Decisions selected from the Advance Reports.

Attorney and Client, Negligence, Accrual of Cause of Action

According to a recent decision of the Supreme Court of Pennsylvania, a mortgagee who contracts for a first lien may recover the difference in value between that and what he gets, from the attorney who undertakes to search the record for her, but negligently overlooks prior liens; and may sue as soon as the inadequacy of her security becomes apparent, without waiting to see if any loss will result from an attempt to collect the loan. *Lawall* v. *Groman*, 37 Atl. Rep. 98.

Whenever one fails to perform a duty imposed by contract, the mere breach of duty is supposed to cause damage to the other party. A right of action in assumpsit or tort, therefore, accrues at the moment of the breach, for nominal damages at least, and the statute of limitations runs against it from that time: *Brown* v. *Howard*, 2 Brod. & B. 73, 1820; *Battley* v. *Faulkner*, 3 B. & Ald. 288, 1820; *Betts* v. *Norris*, 21 Me. 314, 1842; *Schade* v. *Gehner*, (Mo.) 34 S. W. Rep. 576, 1896; *Bk. of Utica* v. *Childs*, 6 Cow. (N. Y.) 238, 1826; *Kerns* v. *Schoonmaker*, 4 Ohio, 331, 1830; *Townsend* v. *Eichelberger*, 51 Ohio St. 213, 1894. This principle applies to an action for negligence on the part of an attorney, which is a breach of his contract of service: *Short* v. *McCarthy*, 3 B. & Ald. 626, 1820; *Howell* v. *Young*, 5 B. & C. 259, 1826; *Green* v. *Dixon*, 1 Jur. 137, 1837; *Blyth* v. *Fladgate*, [1891] 1 Ch. 337, 1890; *Wilcox* v. *Plumer*, 4 Pet. 172, 1830; *Denton* v. *Embury*, 5 Eng. (Ark.) 228, 1849; *Crawford* v. *Gaulden*, 33 Ga. 173, 1862; *Lilly* v. *Boyd*, 72 Ga. 83, 1883; *Gould* v. *Palmer*, (Ga.) 22 S. E. Rep. 583, 1895; *Stafford* v. *Richardson*, 15 Wend. (N. Y.) 302, 1836; *Arnold* v. *Robinson*, 3 Daly, (N. Y.) 298; *Douglass* v. *Corry*, 46 Ohio St. 349, 1889; *Campbell* v. *Boggs*, 48 Pa. 524, 1855; *Moore* v. *Juvenal*, 92 Pa. 484, 1880; *Thomas* v. *Erwin*,

Cheves, (S. Car.) 22, 1839. The measure of damages in such a case is the injury that appears to have been caused at the time by the negligent act; *e. g.*, in taking insufficient security for a loan, the difference between the value of the loan and the actual value of the security with interest and costs: *Russell* v. *Palmer*, 2 Wils. 325, 1767; *Allen* v. *Clark*, 11 W. R. 304, 1863; *Lowenburg* v. *Wolley*, 25 Can. S. C. R. 51, 1895; *Miller* v. *Wilson*, 24 Pa. 114, 1854.

One who finds the ticket office at a station closed, and gets upon a train in ignorance of the fact that it does not stop at the station to which he wishes to go, is not a trespasser, but is entitled to remain on the train, as a passenger, to the first regular stopping place, by paying his fare thereto; and the offer of a person, in company with the plaintiff and others on a train, to pay fare for all the party, accompanied with the taking out of his pocket money more than sufficient to pay all their fares, before the conductor ordered the plaintiff off or made any attempt to stop the train, is a sufficient tender of fare to make a subsequent refusal of the conductor to carry them, followed by their expulsion, wrongful: *Baltimore & Ohio R. R. Co.* v. *Norris*, (Appellate Court of Indiana,) 46 N. E. Rep. 564.

Carriers, Passengers

Tender of Fare

When a train runs beyond a passenger's station, at night, without his knowledge, it is not negligence for the passenger to assume that the car is at the station platform, if invited to alight by the employes of the carrier, the ground being so covered with snow that its surface could not be distinguished: *Chesapeake & Ohio Ry. Co.* v. *Friel*, (Court of Appeals of Kentucky,) 39 S. W. Rep. 704.

Contributory Negligence

The Court of Appeals of New York has practically reversed the ruling of the Appellate Division of the Supreme Court, *People* v. *Hawker*, 43 N. Y. Suppl. 516; 36 AM. L. REG. N. S. 256, that a statute declaring guilty of a misdemeanor any one who, after conviction of a felony, shall practice medicine, applies to one convicted before the passage of the act, and is not *ex post facto*,—

Constitutional Law, Ex Post Facto Law

although the judgment of conviction was affirmed: *People* v. *Hawker*, 46 N. E. Rep. 607. Three only, of the seven judges maintained this point. Two concurred in the result solely on the ground that the record did not show that the defendant was ever a physician, and the other two dissented. (*See note in this number.*)

Police Power

The Supreme Court of Errors of Connecticut has lately ruled that it is within the police power of the legislature to order the destruction of a tree affected by the "peach yellow," without compensation to the owner, and against his will, and may impose a fine for failure to destroy the trees condemned; and since the summary destruction by the state of trees affected with "peach yellows" is within the rule that whatever is dangerous to public health may be summarily abated, the owner has no right, before the trees are condemned, to a jury trial of the question whether they are so diseased: *State* v. *Main*, 37 Atl. Rep. 80.

Scrip and Store Order Acts

In response to interrogatories submitted to it by the Senate, the Supreme Court of Colorado has declared, that legislation which has for its object the protection of laborers from oppression and fraud, by prohibiting employers from issuing, in payment of wages, scrip or store orders redeemable in goods at exorbitant prices, may properly be enacted under the police power of the state; but that if such a statute undertakes to regulate the prices at which merchandise shall be sold by an employer to his employes for cash, it is unconstitutional: *In re House Bill, No. 147*, 48 Pac. Rep. 512.

Contempt, Powers of Notary Public

The Supreme Court of Kansas has recently decided that a notary public has no power to commit for contempt a witness, who, having been duly subpœnaed before him, refuses to be sworn or to give his deposition; and a statute which purports to confer such a power is unconstitutional: *In re Huron*, 48 Pac. Rep. 574.

It is a criminal contempt to publish of a judge, that his decision in a case pending is influenced by political or money considerations, and the offender may be imprisoned therefor, as

well as fined: *Bloom* v. *People*, (Supreme Court of Colorado,) 48 Pac. Rep. 519.

Contract, Ousting Jurisdiction of Court, Rule of Railway Relief Department

The Supreme Court of Ohio has applied the familiar rule that parties cannot oust the jurisdiction of the courts by contract, to the rules of a railway relief department, which provided that all claims of beneficiaries should be submitted to the determination of the superintendent, whose decision should be final and conclusive, unless appealed to the advisory committee, and in case of such appeal the decision of the committee should be final and conclusive upon all parties, without exception or appeal,—holding that after the rejection of a valid claim by the advisory committee, the beneficiary could maintain an action for the recovery of the money due thereon, in spite of that rule: *Baltimore & Ohio R. R. Co.* v. *Stanhard*, 46 N. E. Rep. 577.

Corporations, Incorporation, Fraud on Creditors

When an insolvent merchant procures the organization of a corporation, retaining substantially all of the stock therein, and transferring the bulk of his property to it, for the purpose of delaying and hindering his creditors, and no innocent person contributes any substantial sum to the assets of the corporation, the whole transaction is a sham, and the property of the corporation may be levied upon by the creditors of the promoter, and sold to satisfy their claims: *Kellogg* v. *Douglas Co. Bk.*, (Supreme Court of Kansas,) 48 Pac. Rep. 587.

Criminal Law, Nolle Prosequi, Power of District Attorney

The Supreme Court of Colorado has ruled, in accordance with the weight of authority, that in the absence of any statute changing the rule of the common law, the district attorney, who represents the attorney general in his own district, has the power to enter a *nolle prosequi* in a criminal case without the consent of the court: *People* v. *District Court of Lake Co.*, 48 Pac. Rep. 500.

This power is not unlimited, however. There are three stages in a criminal prosecution, viz.: (1) The inauguration or

preliminary stage, when the indictment is absolutely under the control of the prosecuting officer; (2) The trial of the cause and its incidents, during which the court has control, and the power of the prosecuting officer is suspended; and (3) The period between the verdict of the jury and sentence by the court, when the pardoning power of the governor attaches: *State* v. *Moise*, (La.) 18 So. Rep. 943, 1895. Accordingly, the power of the district attorney to enter a *nolle prosequi* is subject to the following limitations: (1) After the jury has been impaneled and the charge read, he cannot discontinue if the defendant insists upon a verdict; and (2) After verdict and refusal to grant a new trial, he cannot dismiss the prosecution without the leave of the court: *State* v. *Klock*, (La.) 18 So. Rep. 942, 1895. See 35 AM. L. Reg. N. S. 7.

Elections, Marking Ballots, Cumulative Voting

The Queen's Bench Division has lately held, that when a voter has the option of cumulating his votes, he must indicate an intention to do so by putting opposite the name of the candidate for whom he intends to cumulate either crosses or figures indicating the number of votes he intends to cast for him; and that if he does not do so, the court will not presume that he intended to cast but a single vote, although he marks but a few names or only one: *Morris* v. *Beves*, [1897] 1 Q. B. 449.

In this case, there were fifteen candidates to be elected. Some of the voters marked a cross opposite the name of but one candidate, and others opposite three, five, or more; but in each case it was held that but one vote could be counted for the candidates marked, in the absence of figures or crosses to indicate a different intention.

Stickers

According to a recent decision of the Supreme Court of Pennsylvania, under the ballot laws of that state, which authorize no additions to the official ballot except the insertion of names in blank spaces under the titles of offices thereon, there can be no election to an office, the name or title of which is not printed on the ballot, by putting on stickers bearing the title of the office and the name

of the candidate: *In re Contested Election of Lawlor*, 37 Atl. Rep. 92.

The Australian ballot laws do not prohibit the use of printed adhesive slips, or "stickers:" *DeWalt* v. *Bartley*, 146 Pa. 529, 1892, affirming 1 D. R. (Pa.) 199, 1892; but under the decision above, they must contain only the name of the candidate to be voted for, and be inserted in the proper space in the blank column printed for that purpose. *A fortiori* these laws do not permit the use of a printed blanket slip of the size of a column of the official ballot, with the names of a series of candidates, by the pasting of which on the ballot the titles of offices and the spaces for candidates' names designated on the official ballot are obliterated. Other considerations apart, the use of such a slip would enable the voter to prepare his ballot outside of the voting room, contrary to the requirements of the act: *In re Contested Election of School Directors of Little Beaver Twp.*, 165 Pa. 233, 1895, affirming 15 Pa. C. C. 81, s. c., 3 D. R. 685, 1894.

Eminent Domain, Additional Servitude

The Supreme Court of Wisconsin has lately held, that the construction and operation, on a public street, of an electric railway extending between two or more towns or villages, and incorporated for the transportation of merchandise, personal baggage, mail and express matter, as well as passengers, imposes an additional burden, for which the abutting owners are entitled to compensation, and is not merely an exercise of the public easement previously acquired by the construction of the street: *Chicago & N. W. Ry. Co.* v. *Milwaukee, R. & K. Electric Ry. Co.*, 70 N. W. Rep. 678.

Equitable Assignment, Rents

According to another decision of the last mentioned court, when a mortgagee agrees to discontinue foreclosure, in consideration of the application of the rents of the mortgaged land on his debt, and the mortgagor instructs his agent to pay over the rents, as collected, to the mortgagee, this instruction constitutes an equitable assignment of the rents, so that, when collected and

in the hands of the agent, they are not subject to garnishment by a judgment creditor of the mortgagor: *Baillie* v. *Currie*, 70 N. W. Rep. 660.

Equity, Bill to Enlarge Decree

The Supreme Court of Tennessee has lately ruled that when a decree simply adjudged a husband, who was trustee for his wife, individually liable for a certain debt of the wife, on the ground that he had received from her former trustee an estate more than sufficient to pay the debt, a bill by the creditor to charge the wife's separate estate with the debt was a bill to enlarge the decree, and could not lie, although the decree recited that "for the payment of said debt said estates were liable;" no estate being described or ordered to be sold to satisfy the debt: *Helms* v. *Rizer*, 39 S. W. Rep. 718.

Estoppel, Deed by Grantor Having no Title

When a grantor who has no title purports to grant a particular piece of land by deed to one for life, with remainder over, and the grantee for life enters upon the land under the deed, and acquires a good title by possession against the true owner, he is estopped as against the remainderman from disputing the validity of the deed: *Dalton* v. *Fitzgerald*, (Chancery Division, Stirling, J.,) [1897] 1 Ch. 440.

Evidence, Telephone Conversation

On an issue as to the substance of a conversation carried on by telephone, one of the speakers cannot testify that he repeated to a third person what he had heard from the other: *German Sav. Bk. of Davenport* v. *Citizens' Nat. Bk. of Davenport*, (Supreme Court of Iowa,) 70 N. W. Rep. 769.

False Pretences, Supernatural Powers

A false representation that one has extraordinary and supernatural power to cure disease is a representation as to an existing fact, and is not affected by a promise simultaneously made, to exercise that alleged power in the future to cure the person to whom the representation is made: *Jules* v. *State*, (Court of Appeals of Maryland,) 36 Atl. Rep. 1027.

This decision is supported by the weight of authority: *R.* v.

Giles, 10 Cox C. C. 44, 1865; *R.* v. *Lawrence*, 36 L. T. N. S. 404, 1877; *Commonwealth* v. *Gordon*, 15 W. N. C. 282, 1884. The case of *State* v. *Burnett*, 119 Ind. 392, S. C. 21 N. E. Rep. 972, 1889, which decided, on the other hand, that a claim by the defendant that he was a witch doctor, and had the power to kill witches, that the prosecutor was being bothered and tormented by witches, and that if the prosecutor would give him certain articles he would kill and destroy all the witches and save the prosecutor and his family from further trouble, was not a false pretence, because it was not such a representation as a man of common understanding was justified in relying on, and was not a representation of an existing fact, but a mere expression of opinion, is without authority. A false pretence need not be in regard to a fact which does in reality exist, but may be a representation that a fact exists when it does not exist. See 14 CRIM. L. MAG. 1, 4.

Forgery

A paper purporting to authorize the bearers to solicit subscriptions for a labor organization is not a "letter of attorney," or an "order for money," within the meaning of a statute making such instruments the subject of forgery: *People* v. *Smith*, (Supreme Court of Michigan,) 70 N. W. Rep. 466.

Fraud, Fraudulent Representations

In *Edelman* v. *Latshaw*, (Supreme Court of Pennsylvania,) 36 Atl. Rep. 926, an executor sold some certificates of stock, belonging to the estate of his father, and considered worthless, for a nominal sum. He subsequently received a letter, directed to the decedent, offering two dollars a share for the stock; whereupon he tried to repurchase it from the purchaser at the sale, stating to him that he wanted it, because his father had held it so long, and that it had no market value. On the strength of these representations, the stock was resold to him. After discovering the facts, the purchaser sued him for fraudulent representations; and the court below entered a compulsory nonsuit; but this judgment was reversed by the supreme court, which held that the action could be maintained.

Game, Close Season

The Court of Appeals of Maryland, adopting the rule of reason and justice, has recently held, that under the Code of that State, Art. 99, § 13, as amended by the act of 1894, c. 404, which provides that "No person shall shoot or in any manner catch, kill, or have in his possession, ... any rabbit, between the twenty-fourth of December and the first of November next ensuing," the possession between those dates, of rabbits lawfully killed in another state, is not unlawful: *Dickhaut* v. *State*, 37 Atl. Rep. 21.

There is a note on this subject in 35 AM. L. REG. N. S. 649. To the cases there cited as upholding the rule laid down above, may be added *State* v. *McGuire*, 24 Oreg. 367, 1893.

Garnishment, Judgment Rendered in One State, Bar to Action In Another

When a garnishee corporation, doing business in two states, has been compelled to pay a judgment rendered against it in the courts of one state, that judgment may be pleaded in bar in garnishment proceedings in another state at the suit of another creditor to reach the same debt, though the latter suit was commenced first: *Lancashire Ins. Co.* v. *Corbetts*, (Supreme Court of Illinois,) 46 N. E. Rep. 631.

Homicide, Self Defense, Imminent Danger, Charivari

In *State* v. *Countryman*, 48 Pac. Rep. 137, the Supreme Court of Kansas has decided that a man has no right to repel a "charivari" party by the use of deadly weapons, on the principle that although one may defend himself and his family with such weapons from a felonious assault, if necessary to protect them from such assault, and may also defend his habitation from a like assault by the use of like weapons, if necessary to preserve it from destruction or serious injury, he has no right to resist with such weapons an attack upon his person, family, or habitation which is not felonious,—*i. e.*, an assault not made under such circumstances, and with such means, and under such appearances as to justify a belief in imminent danger of great bodily harm to the person, or destruction or serious injury to the habitation—such as the attack of such a party.

This lays down a stricter rule than that announced by the

Supreme Court of Michigan in *Patten* v. *People*, 18 Mich. 314, 1869, under similar circumstances, where the defendant, fearing that his mother might be seriously injured by fright caused by the noise, went out of the house with an axe in his hand, hit one of the party a blow with the axe, which resulted in his death. The court held, per Christiancy, J.: "There was evidence—and the statement of the prisoner made in the trial must for this purpose be treated as such—from which the jury might have found (as supposed in part of the charge given by the court below) that the defendant took the axe from the house for the purpose of self defense, and stepped out of the door for the purpose of inducing the rioters to leave, or of dispersing them: and that as he stepped out, the crowd cried out, 'Kill him, damn him, kill him,' and that rushing towards him, some one or more of them hit him with a gun or club or other weapon. If this hypothesis should be found to be true, instead of the charge given by the court, the jury should, I think, have been told substantially that the defendant was excusable for acting according to the surrounding circumstances as they appeared to him; and if, from these circumstances, he believed there was imminent danger of death or great bodily harm to himself or any member of his family, then, if he had already tried every other reasonable means which would, under the circumstances, naturally occur to an honest and humane man, to ward off the danger or repel the attack, he might resort to such forcible means, even with a dangerous weapon, as he believed to be necessary for protection; and if such means resulted in the death of any of the supposed assailants, the homicide would be excusable."

Husband And Wife, Desertion, Rights of Wife

The Supreme Court of Minnesota has recently declared constitutional a statute, (Gen. Stat. Minn., 1894, § 5,165,) which provides, that "when a husband has deserted his family the wife may prosecute or defend in his name any action which he might have prosecuted or defended, and shall have the same powers and rights therein as he might have had:" *Allen* v. *Minnesota Loan & Trust Co.*, 70 N. W. Rep. 800.

The conveyance of two hundred acres of land by a father to his minor children, in contemplation of a second marriage, is not in itself a fraud on the marital rights of the second wife, when he retains eighty acres, upon which are all the improvements made on his land: *Goodman* v. *Malcom*, (Court of Appeals of Kansas, Northern Dept., D. C.,) 48 Pac. Rep. 439.

Fraud on Marital Rights

The Supreme Court of Minnesota has joined the ranks of those who hold that under the married women's acts, a wife may maintain an action against persons who wrongfully entice her husband from her and alienate his affections, and thereby cause a separation between them: *Lockwood* v. *Lockwood*, 70 N. W. Rep. 784.

Husband and Wife, Alienation of Husband's Affections, Right to Sue

It seems never to have been seriously doubted that a husband has a right of action, *per quod consortium misit*, against one who alienates the affections of his wife; and it is the general doctrine that a wife has also a right of action against any one who alienates the affections of her husband, though unable to avail herself of it under the common law, because of the legal fiction of the merger of her identity in that of her husband. But where the married women's property acts are in force, this reason is removed, and the right of the wife to recover in such a case is commensurate with that of her husband, whether the statute confers upon her the express power of suing, or not: *Waldron* v. *Waldron*, 45 Fed. Rep. 315, 1890; *Williams* v. *Williams*, 20 Colo. 51, 1894; *Foot* v. *Card*, 58 Conn. 1, 1889; *Bassett* v. *Bassett*, 20 Ill. App. 543; *Haynes* v. *Nowlin*, 129 Ind. 581, 1891, overruling *Logan* v. *Logan*, 77 Ind. 558, 1881; *Wolf* v. *Wolf*, 130 Ind. 599, 1892; *Holmes* v. *Holmes*, 133 Ind. 386, 1892; *Warren* v. *Warren*, 89 Mich, 123, 1891; *Rice* v. *Rice*, (Mich.) 62 N. W. Rep. 833, 1895; *Clow* v. *Chapman*, 125 Mo. 101, 1894; *Nichols* v. *Nichols*, (Mo.) 35 S. W. Rep. 577, 1896; *Hodgkinson* v. *Hodgkinson*, 43 Neb. 269, 1895; *Adams* v. *Seaver*, 66 N. H. 142, 1889; *Breiman* v. *Paasch*, 7 Abb. N. C. (N.Y.) 249, 1879; *Baker* v. *Baker*, 16 Abb. N. C. (N. Y.) 293, 1885; *Warner* v. *Miller*, 17 Abb. N. C. (N. Y.) 221, 1885; *Churchill* v.

Lewis, 17 Abb. N. C. (N. Y.) 226, 1885; *Jaynes* v. *Jaynes*, 39 Hun, (N. Y.) 40, 1886; *Bennett* v. *Bennett*, 116 N. Y. 584, 1889, which finally overruled *Van Arnam* v. *Ayers*, 67 Barb. (N. Y.) 544, 1877; *Eldredge* v. *Eldredge*, 79 Hun, (N. Y.) 511, 1894; *Mainwarren* v. *Mason*, 79 Hun, (N. Y.) 592, 1894; *Van Olinda* v. *Hall*, 88 Hun, (N. Y.) 452, 1895; *Contra*, *Doe* v. *Roe*, 82 Me. 503, 1890; *Duffies* v. *Duffies*, 76 Wis. 374, 1890. Accordingly, she may maintain an action on this ground against the paramour of her husband: *Foot* v. *Card*, 58 Conn. 1, 1889; or against the husband's parents: *Mehrhoff* v. *Mehrhoff*, 26 Fed. Rep. 13, 1886; *Williams* v. *Williams*, 20 Colo. 51, 1894; *Postlewaite* v. *Postlewaite*, 1 Ind. App. 473, 1891; *Railsback* v. *Railsback*, 12 Ind. App. 659, 1895; *Price* v. *Price*, 91 Iowa, 693, 1894; *Bailey* v. *Bailey*, (Iowa,) 63 N. W. Rep. 341, 1895; *Eldredge* v. *Eldredge*, 79 Hun, (N. Y.) 511, 1894; *Westlake* v. *Westlake*, 34 Ohio St. 621, 1878; or against any stranger, whose conduct has occasioned the alienation: *Lynch* v. *Knight*, 9 H. L. Cas. 577, 1861. But when the suit is against a parent, something more must be proved than mere advice to the husband to leave his wife, for a parent may, when acting in good faith, advise his son thus, without incurring liability: *Huling* v. *Huling*, 32 Ill. App. 519, 1889; *Rice* v. *Rice*, (Mich.) 62 N. W. Rep. 833, 1895; *Tucker* v. *Tucker*, (Miss.) 19 So. Rep. 955, 1896; *Pollock* v. *Pollock*, 29 N. Y. Suppl. 37, 1894; *Young* v. *Young*, 8 Wash. 81, 1894; and consequently the complainant in such a case must allege that the acts which produced the alienation were maliciously done: *Reed* v. *Reed*, 6 Ind. App. 317, 1892.

A wife may maintain such an action, though she be still living with her husband: *Foot* v. *Card*, 58 Conn. 1, 1889; or after divorce for the husband's fault, if the alienation occurred before the divorce: *Clow* v. *Chapman*, 125 Mo. 101, 1894; but if she leaves him of her own accord, before procuring a divorce, she cannot recover after it is procured: *Buckel* v. *Suss*, 21 N. Y. Suppl. 907, 1893, affirming 18 N. Y. Suppl. 719. She may recover for mental anguish, mortification, and injured feelings, occasioned by the loss of her husband's affections, without showing actual loss of support: *Rice* v. *Rice*, (Mich.)

62 N. W. Rep. 833, 1895; And may recover exemplary damages, under a statute (Laws Colo. 1889, p. 64,) authorizing such a recovery when the injury complained of is the result of a "wanton and reckless disregard of the injured party's rights and feelings:" *Williams* v. *Williams*, 20 Colo. 51, 1894. She cannot, however, bring an action of *crim. con.* against the paramour of her husband, even where the married women's property acts are in force: *Doe* v. *Roe*, 82 Me. 503, 1890; *Kroessin* v. *Keller*, 60 Minn. 372, 1895.

Injunction To Restrain Interference with Possession of Land

According to a recent decision of the Supreme Court of Oklahoma, when two parties are contending before the United States land department for a tract of government land, and the final decision is had in favor of one of them, the successful party may bring an action in the territorial court for an injunction to restrain his adversary from further interfering with his possession of the premises; and in that cause the court may properly award an injunction which prevents the unsuccessful party from remaining in occupation of the disputed premises: *Barnes* v. *Newton*, 48 Pac. Rep. 190.

This follows two prior decisions of the same court: *Reaves* v. *Oliver*, 3 Okl. 62, 1895; *Woodruff* v. *Wallace*, 3 Okl. 355, 1895.

Insurance, Accident, Renewal, Effect

When an accident insurance policy is issued, renewable yearly as long as the assured pays the specified premium in advance and the insurance company consents to receive it, and requiring the assured at each renewal to give notice of any change in his state of health since the payment of the last premium, with power for the company in each case to determine the policy, an entirely new contract arises upon the payment of the premium for each year, for that year only, and the amount payable under it on the accidental death of the assured in the current year for which a premium has been paid is not affected by any assignment or other obligation made or entered into by the assured in any previous year and not extending to after-acquired

property: *Stokell* v. *Heywood*, (Chancery Division, Kekewich, J.,) [1897] 1 Ch. 459.

Sunday Laws

A plaintiff who is injured by falling from his bicycle while returning home from a friend's funeral, on Sunday, though not by the direct road, may recover under a policy of accident insurance, though it contains a clause preventing recovery for an injury received "while or in consequence of violating any law." Riding to a funeral, or walking or riding for health or exercise, on Sunday, does not fall within the prohibition of the Sunday laws: *Eaton* v. *Atlas Accident Ins. Co.*, (Supreme Judicial Court of Maine,) 36 Atl. Rep. 1048.

Policy, Construction

The Supreme Court of Mississippi, in *Stephens* v. *Railway Officials' & Employes' Acc. Assn.*, 21 So. Rep. 710, has rendered a very important decision in regard to the construction of an accident insurance policy. The first paragraph of the policy in question provided for insurance against death or injury by external means leaving a visible mark on the body. A subsequent independent paragraph covenanted to pay one-tenth the value of the face of the policy if the injury causing death left no visible marks, "or if such injury or death shall result from the intentional acts of any person other than the insured." The death of the insured resulted from the intentional act of another, which left its visible mark on his body, and the court held that the beneficiary was entitled to recover the whole amount of the policy.

Credit Insurance, Policy, Construction, Premiums, Renewals

The Court of Errors and Appeals of New Jersey has lately passed upon a very interesting point of insurance law, in *Lauer* v. *Gray*, 37 Atl. Rep. 52. The plaintiffs held a policy of insurance against the loss of credits for goods shipped and loss occurring between the commencement and expiration thereof, which contained a provision that "if this certificate is renewed by the said above-named party on or before the date of its expiration, at the regular terms of the company in force at the time of such renewal, then, in that case, losses occurring after the expiration of this certificate on goods shipped between the commencement and the expiration thereof shall be provable under the renewal in the same manner as if losses occurred

on goods shipped after the commencement of the renewal." Losses occurred upon this original policy in accordance with its terms and conditions, which, upon adjustment and allowance by the insurers, were not paid to the insured, but retained by the insurers, under an agreement made subsequent to the expiration of the policy, that upon the cancellation thereof such losses should serve as the payment of a premium for a renewal policy; but these losses were not adjusted, the original policy was not cancelled, and the renewal policy was not executed and delivered until after the original policy had expired. The insurer subsequently went into the hands of a receiver, who refused to allow a claim for losses on goods shipped during the life of the original policy, but occurring after its expiration, under a condition in the renewal policy that " if this certificate has been paid for on or before the date of the expiration of the certificate held by the above-named party last prior to this one, then, in that case, losses occurring during the life of this certificate on goods shipped during the term of the last prior one shall be included in the calculation of losses under this certificate, in the same manner as if the goods had been shipped and the loss had occurred during the life of this certificate," on the ground that the premium was not paid on or before the expiration of the prior policy, and the new policy was therefore not a renewal. The plaintiffs appealed to the court of chancery, which dismissed their petition; but this decree was reversed by the court of errors and appeals, which held that the retention of the losses on the first policy under the agreement constituted payment of the renewal premium " on or before the date of the expiration " of the original policy, and was a sufficient compliance with the last-named condition; that the two policies were connected together, and had reference to each other; that the adjustment of loss, the cancellation of the first policy, the agreement to retain the loss in lieu of renewal premium, and the execution and delivery of the renewal policy, had relation to the life of the prior policy, the losses upon which, by virtue of the agreement, constituted the payment of the renewal premium, by reason of the situation which existed before the expiration of the original policy,

to which the renewal had reference; that it was immaterial, under the circumstances, that the execution and delivery of the renewal was postponed until the adjustment of the losses and the cancellation of the former policy could be accomplished; that when the obligation of the insurer to issue and deliver the certificate of renewal, accepting, in payment of the renewal premium, the losses coming to the insured upon the prior policy when these were adjusted and the policy cancelled, was established, the payment related back to the life of the prior policy, and was of the time during which those losses occurred; and the mere delay during negotiations, to put the obligation into a written agreement or contract, or to embody it in a formal certificate of renewal, did not alter or extinguish that obligation; and that equity will impute the intention to fulfil such an obligation, and when necessary to protect and enforce the just rights of the parties, will assume the obligation to have been fulfilled, in accordance with the principle that equity looks upon that which ought to be done as already done.

Life Insurance, Suicide

When a life insurance policy provides that if, within two years from the date thereof, "the said assured shall, whether sane or insane, die by his own hand, then this policy shall be null and void," the insurer will not be liable if within the two years, the assured, whether sane or insane, commits suicide, and the liability of the insurer is not affected by the degree of insanity: *Spruill* v. *Northwestern Mut. Life Ins. Co.*, (Supreme Court of North Carolina,) 27 S. E. Rep. 39.

In this case the proof of death stated that the assured died by a "pistol shot from his hand;" and this, unexplained, was held to throw on the plaintiff the burden of proof that the decedent did not commit suicide, and to warrant the directing of a verdict for the defendant.

Landlord and Tenant, Repairs, Negligence

When a landlord undertakes to put a new roof on the demised premises, at the request of his tenant, he will be liable to the tenant for injury caused by the negligent manner in which the work is done, and cannot exonerate himself by committing it to an independ-

ent contractor: *Wertheimer* v. *Saunders*, (Supreme Court of Wisconsin,) 70 N. W. Rep. 824.

The Superior Court of Pennsylvania has recently held, that a charge that a candidate for public office "did violate the law and take fees to which he was not entitled," is libelous *per se*; that although it was made on a proper occasion and from a proper motive, the plaintiff being at the time a candidate for office, the defendant will not be relieved of responsibility when he not only fails to show the truth of the statement but also to establish that it was based on a reasonable or probable cause; and that in such a case it is not sufficient to show that the defendant had information which led him to believe it was true; but that the circumstances leading to that belief must be shown, in order that it may appear whether or not it was well founded: *Coates* v. *Wallace*, 4 Pa. Super. Ct. 253.

Libel, Candidate for Office, Privileged Communications

A publication in a newspaper, falsely charging a police officer with extortion, in purposely swelling the amount of a prisoner's fine, collecting the same of the prisoner's family to procure his discharge and pocketing the difference, is libelous; and though it was made without malice or improper motives, and for the dissemination of news and information to the citizens of the locality, it is not privileged thereby: *Benton* v. *State*, (Court of Errors and Appeals of New Jersey,) 36 Atl. Rep. 1041.

Libel, Privilege, Dissemination of News

In a case recently decided by the Court of Appeal of England, *Tate* v. *Latham*, [1897] 1 Q. B. 502, the plaintiff was employed at defendant's saw-mills to assist one of their sawyers, who was engaged at a circular saw. The defendants had provided the saw with a sufficient guard or fence under the bench for the prevention of accidents. The guard was made moveable, in order to remove the sawdust which collected under the bench. The sawyer improperly removed the guard for his own purposes, and while it was off the plaintiff fell against the saw and was injured. The absence of the guard

Master and Servant, Defective Machinery, Act of Fellow Servant

was held to be a defect in the condition of the machinery, within § 1 of the Employers' Liability Act, 1880, which gives a workman the same remedy against his employer as if he had not been in his service, when personal injury is caused to him "by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer."

This would not be law in the United States at the present time; but as the day is not far distant when we shall have statutes similar to the one cited, it is worth while to study its interpretation, in order that we may know the consequences of such legislation. The ruling in this case certainly tends to overthrow all the established rules as to the negligence of fellow servants.

The motorman of an electric street railway car, who occupies a position analogous to that of the engineer of a steam railroad train, is a fellow servant with the track foreman: *Rittenhouse* v. *Wilmington St. Ry. Co.*, (Supreme Court of North Carolina,) 26 S. E. Rep. 922.

Fellow Servant

A payment on a mortgage, made by an owner of the equity of redemption of part of the premises, before the statute has run against the right of redemption, will inure to the benefit of the owners of the equity in the other portion of the mortgaged land, and remove the bar of the statute as to the whole: *Longstreet* v. *Brown*, (Court of Chancery of New Jersey,) 37 Atl. Rep. 56.

Mortgage, Redemption, Bar of Limitation

The Supreme Court of Kansas has adopted the rule of reason and justice, now almost everywhere prevalent, that the negligence of a husband cannot be imputed to his wife, who is riding with him over a defective highway, unless it can be shown that the husband was at the time under the direction and control of the wife; and this, even though the journey was undertaken at the

Negligence, Imputed, Husband and Wife

solicitation of the wife. The latter fact is immaterial: *Reading Twp.* v. *Telfer*, 48 Pac. Rep. 134.

There is a full annotation on this subject in 32 AM. L. REG. N. S. 763 *et seq.*; and short notes in 33 AM. L. REG. N. S. 314, 870; 34 AM. L. REG. N. S. 97, 229, 567, 643; 35 AM. L. REG. N. S. 527.

Street Railways, Disorderly Conduct of Passengers, Liability of Company

In *Boatwright* v. *Chester and Media Electric Ry. Co.*, 4 Pa. Super. Ct. 279; the defendant company had sent out an excursion train, (so the opinion reads,) of three cars, in charge of a motorman and two conductors, with about two hundred and twenty-five passengers. As the cars neared the plaintiff, who was riding in a buggy with a friend, the passengers became uproarious, blew horns, waved flags, etc., and frightened the horse so that he ran away, upsetting the buggy and injuring the plaintiff. The trial judge refused to charge that the verdict of the jury must be for the defendant; and the Superior Court held this to be error, and reversed the judgment, which was for the plaintiff, on the sole ground that the company was not responsible for the noise made by the passengers.

The reasons for this holding appear from the opinion of the court: "If the company deliberately loaded its cars with excursionists equipped with horns and flags, knowing they intended to wave flags and blow horns along the route, and thereby frighten horses lawfully upon the highway, for such conduct it might be held liable. Or if it knowingly permitted such demonstrations from time to time as a part of its business upon the road, so as to become a nuisance and constant menace to persons driving vehicles upon the highway, they undoubtedly would be liable for the result of such nuisance and menace. *But there are no such circumstances in this case.* . . . . . There was no evidence that the company, its conductors or employes, anticipated any unusual noise on the part of the passengers. . . . . The company was under no obligation to provide a police force in anticipation of riots. . . . . The sudden outburst of passengers in a noisy demonstration was not an occurrence that the appellant was bound to anticipate or guard against."

Pensions, Illegal Fee

According to the Supreme Court of Pennsylvania, a gift of a pension check for an amount exceeding twenty-five dollars, by a pensioner of the United States, in consideration that the donee would provide for him during the rest of his life, and for his burial on his death, is not invalid under the pension laws of the United States, which provide that the fee for prosecuting a pension claim shall not exceed twenty-five dollars, though the gift be to the attorney who procured the allowance of the pension, and be made as a result of the donee's services in securing the pension: *Schwab* v. *Ginkinger*, 37 Atl. Rep. 125.

Physicians, Degree of Skill

The Supreme Court of Iowa has lately ruled that in an action against a physician for malpractice, it is not erroneous to charge that he is required "to exercise the degree of skill possessed by physicians practising in *this* locality," instead of "that possessed by physicians practising in *similar* localities:" *Whitesell v. Hill*, 70 N. W. Rep. 750.

Power, To Dispose of Property by Will, Execution, Effect

When a testator wills his property to his wife during widowhood, with absolute power to dispose of it by will, and she executes this power by devising the property to volunteers, leaving debts of her own unprovided for, the property so devised becomes a part of her estate on her death, and is subject to the claims of her creditors: *Freeman* v. *Butters*, (Supreme Court of Appeals of Virginia,) 26 S. E. Rep. 845.

Railroad Bonds, Coupons, Foreclosure, Distribution of Proceeds

In *Burke* v. *Short*, (Circuit Court of Appeals, Sixth Circuit,) 79 Fed. Rep. 6, a decree for the distribution of the proceeds of a sale under the foreclosure of a mortgage, which provided that the coupons of the bonds secured by it should be preferred over the principal, directed that the surplus, after paying preferred claims, should be equally divided among the bonds, paying a certain sum, less than the face of the bond, to the holder of each bond. Some of the coupons which had matured prior to the

foreclosure were subsequently detached from the bonds, and their holder petitioned to intervene, in order to collect the coupons. The circuit court of appeals held, affirming the decision of the circut court, that though the decree mentioned bonds only, it could not be construed as intended to disregard the preference of the coupons, but was intended to deal with the ownership of bonds with their coupons, when the holders of each were the same, and that the holder of the detached coupons was therefore entitled to be paid their full value; and further, that coupons which had not matured at the time of the foreclosure, though merged thereby in the principal of the bonds, were entitled, when detached and separated from the bonds in ownership, to be paid proportionately with the remainder of the principal.

Railroad Companies, Mandamus, Maintenance of Branch Road

The Supreme Court of Appeals of Virginia has recently decided, that a railroad company, which purchased the property and franchises of another railroad company at foreclosure sale, will not be compelled by mandamus to continue to maintain and operate a branch road, the maintenance and operation of which with its terminal has proved for several years a serious loss to the company, when the same business can be handled with reasonable facility, and at much less expense, through another terminal, although the terminal abandoned was constructed in consideration of a subscription to the stock of the original company by the town in which the terminal was situated, and although the Code of Virginia, § 1234, as amended by Acts Va. 1891-2, p. 623, provides that a corporation which purchases the property of another at foreclosure sale, or succeeds it by reorganization, shall perform the duty "of maintaining and operating any branch or lateral road which may have been constructed and operated before the sale:" *Sherwood* v. *Atlantic & Danville R. R. Co.*, 26 S. E. Rep. 943.

While this decision may be law to the extent that the courts will not enforce the doing of a useless thing, it certainly is bad morals to permit a duty incurred on a valid consideration, performed by the other party, to be lightly violated in this way;

and though the corporation may not be compelled to perform the duty, it should certainly be held to have forfeited its franchises by refusing to perform it.

Similarly, mandamus will not lie to compel a street railroad company to continue to operate its lines over certain streets, when its charter imposes no specific obligations, and the ordinance giving the franchise on the streets merely granted "the privilege" of constructing and maintaining street railways over the lines designated therein: *San Antonio St. Ry. Co.* v. *State*, (Supreme Court of Texas,) 39 S. W. Rep. 926, reversing 38 S. W. Rep. 54.

Street Railroads, Operation of Line, Mandamus

The Supreme Court of the United States has recently held, in *Gladson* v. *State of Minnesota*, 17 Sup. Ct. Rep. 627, affirming 57 Minn. 385, that a state statute (Laws Minn. 1893, p. 173,) requiring every regular passenger train running wholly within the limits of the state to stop at all stations at county seats directly in its course, to take on and discharge passengers, is a valid exercise of the police power of the state, and is neither a taking of the property of the company without due process of law, nor an unconstitutional interference with interstate commerce or with the transportation of the United States mails.

Railroads, Stopping of Trains, Constitutional Law

Since a telegraph company has the right to choose its own agencies for the delivery of messages, and to require that messages given it for transmission shall be in writing, it is not a discrimination against one telephone company to refuse to deliver telegrams to its subscribers by its telephones, paying it for the use of them, or to receive messages by its telephones to be telegraphed, though by contract with another telephone company messages are so delivered and received by means of its telephones: *People* v. *Western Union Tel. Co.*, (Supreme Court of Illinois,) 46 N. E. Rep. 731.

Telegraph Companies, Discrimination, Telephone Companies

It was also held in this case that a statute requiring a telegraph company to receive and transmit messages from

other telegraph companies, does not compel it to receive verbal messages by telephone.

In *Hill* v. *Hill*, [1897] 1 Q. B. 483, the Court of Appeal of England recently held that a statement by the widow of a peer in a letter or memorandum sent to her solicitor that certain diamonds had been given to her upon her marriage by the mother of her husband, then heir presumptive to the peerage, for her life, with the request that at her death they might be left as heirlooms, did not import a precatory trust, and that the absolute property in the diamonds consequently passed to the donee.

Trust, Precatory

The legislature only, and not the state officers, has power to accept a bequest to the state in trust; the adoption by both houses of the legislature of the report of a joint committee, recommending that a bill accepting a bequest to the state be not passed, is a rejection of the bequest; and evidence that the committee was misled by a decision construing the will is inadmissible, when the reasons of the committee for its action were not reported to the legislature, since the reasons for the action of individual members are not admissible to affect a legislative act: *State* v. *Blake*, (Supreme Court of Errors of Connecticut,) 36 Atl. Rep. 1019.

Wills, Bequest to State, Rejection

Ardemus Stewart.